APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE PECHANGA BAND OF MISSION INDIANS,

Plaintiff,

v.

KACOR REALTY, INC., etc., et al,

Defendants.

No. CV-78-4499-MML

MEMORANDUM

Defendants' motion for summary judgment came on for hearing before the Honorable Malcolm M. Lucas, United States District Judge on June 16, 1980. After thoroughly considering the papers filed in this action and the arguments advanced at the hearing, the Court finds that no genuine issue of material fact exists and that defendants are entitled to judgment as a matter of law. Accordingly, the Court is entering, concomitantly with this Memorandum, a Judgment in favor of defendants and against plaintiff.

Although under F.R.C.P. 52(a) findings of fact and conlusions of law are unnecessary on decisions under Rule 56, it is helpful to the parties and to a reviewing Court if the trial court sets out those facts it finds are not disputed and the conclusions of law upon which the Court's decision rests. Particularly are such elucidations of value where, as here, either the factual setting or the legal principles are complex or where the record as a whole is voluminous. The

Court recognizes that the facts set forth cannot be "found" in the sense that they are the product of the Court's resolution of issues disputed by the parties. Rather, they are simply statements of the facts the Court finds to be material and as to which the Court determines that there is no genuine issue. *See, Garter-Bare Co. v. Munsingwear, Inc.*, _____ F.2d _____, (No. 75-3826) (9th Cir., April 17, 1980) *(especially*, Wallace, J., concurring).

In this action, the material facts are readily admitted by both sides. The parties differ as to only one factual area and, for the purposes of this motion only, defendants concede that plaintiff's position is correct.

In 1864, Congress enacted the Four Reservations Act (13 Stat. 39) permitting the President to designate reservation land for four California Indian tribes including the Mission Indians. Subsequent to this Act, several designations of land for Mission Indians were made.

On January 5, 1882, a Certificate of Entry was issued by the Land Office to Peter Mouren for a parcel of land involved in this litigation known as the preemption parcel. About two weeks later, on January 23, 1882, the Land Office recorded an entry by Mouren on the second parcel involved in this litigation, the homestead parcel. The homestead and preemption parcels are contiguous. It is alleged by plaintiff that on January 24, 1882 Mouren transferred his interests in both parcels to one Louis Wolf. It is admitted by both parties that such a transfer would invalidate any claim Mouren had to the parcels under the homestead or preemption laws and would be a fraud on the government. Defendants admit these facts for the purposes of this motion only.

President Arthur issued an Executive Order on June 27, 1882, under the authority of the 1864 Act of Congress, that added a large area of land to the Mission Indian reservation. The boundaries of this grant included both the homestead and preemption parcels. The Executive Order stated that all lands within the designated boundaries were to be reservation lands, "PROVIDED, HOWEVER, That

any tract or tracts the title to which has passed out of the United States, or to which valid, legal rights have attached under existing laws of the United States providing for the disposition of the public domain, are hereby excluded from the reservation hereby created."

The Land Office issued a patent on the preemption parcel to Mouren on September 20, 1882. Mouren commuted his homestead entry on September 27, 1882 and received a patent to the land on June 12, 1885.

Congress enacted the Mission Indians Relief Act (26 Stat. 712) on January 12, 1891. The Act provided for the reexamination of the existing Mission Indian reservation lands and for the patenting of lands to the tribes based upon the Indians' actual possession of land and their need for such land. On August 29, 1893, on the basis of a commission study made under the 1891 Act, a Trust Patent was issued to the Mission Indians for reservation lands. This patent included most of the land reserved under the 1882 Executive Order but did not include either the preemption or homestead parcel. In addition, two other small parcels of the 1882 grant were not included but two small additions (one non-contiguous) of land were made.

In 1894 the United States filed bills in equity in the Circuit Court for the Southern District of California alleging that the patents to the homestead and preemption parcels had been obtained by fraud and praying that the Court declare the patents invalid and that the lands be restored to the public domain. Service of process was never effected in either suit and in 1901 the United States voluntarily dismissed the bills.

Plaintiff, the Indian tribe holding under the 1882 grant and 1893 trust patent, brings suit against defendants, the successors in interest to the original patentee, seeking title to the preemption and homestead parcels. It is not disputed that defendants' title is traceable to Mouren nor that plaintiff has not occupied the disputed parcels at least since 1882. In resolving this action on the facts as presented, three substantive areas of dispute are presented. First, the

status of the parcels at the time of the 1882 Executive Order. Second, the effect, if any, of Mouren's fraud in procuring title to the parcels. Finally, the effect, if any, of actions subsequent to the 1882 Executive Order, notably the 1891 suits and the 1893 trust patent. Additionally, plaintiff raises an issue under 25 U.S.C. §194 that challenges the properiety of summary judgment in this action. That argument may be dealt with summarily.

25 U.S.C. §194, originally enacted in 1834, provides that, in land cases involving Indians and whites, the burden of proof shall be on the white where the Indian establishes a prima facie title through previous possession or ownership. Plaintiff contends that this section precludes summary judgment. The Court holds, however, that §194 merely establishes a burden of proof through a rebuttal presumption. If no genuine issue of material fact exists, summary judgment may be entered where one party shows it is entitled to judgment as a matter of law. In short, §194 cannot prevent an otherwise proper entry of summary judgment.

Turning to the first issue of substance, the status of the parcels at the time of the 1882 Executive Order, the Court finds, and the parties agree, that, under the Executive Order language quoted above, the lands became part of the Indian reservation unless prior to the Executive Order they had been removed from the public domain such that the President had no power to dispose of them through the Executive Order. Both parties also agree, and the Court so finds, that steps taken prior to issuance of a patent could suffice to remove lands from disposition under the Executive Order. Plaintiff asserts that only by taking the last act necessary for issuance of a patent can the lands be removed from the disposition under the Executive Order. Defendants allege that "entry" is sufficient to remove the lands. Defendants admit that entry occurs at different points in the settlement and patenting process for lands obtained under the preemption laws and for those under the homestead laws.

The Court finds that entry is the point at which property interests attach to lands under both the preemption and homestead laws sufficient to remove lands from disposition from the public domain. *See*, 17 Op. Atty. Gen. 160 (1881). Plaintiff's position that entry establishes rights against third parties but not against the power of the United States to dispose of the public domain does not find support in the case law. *See*, e.g. *Hastings & Dakota R.R. v. Whitney*, 132 U.S. 357 (1889). The parties agree and the Court finds that, as to the preemption parcel, Mouren's rights had so attached at the time of the 1882 Executive Order that the Order did not transfer the preemption parcel to the Indian reservation. Under plaintiff's theory, Mouren had taken the last act necessary for issuance of a patent as to the preemption parcel prior to the Executive Order. Under defendants' theory, and the law as the Court finds it, Mouren had received a Certificate of Entry from the Land Office prior to the Executive Order. *See*, Exhibit 1 to Appendix I, entry dated January 5, 1882. As to the homestead parcel, the Court finds that entry occurred prior to the Executive Order and therefore that Mouren's rights in that parcel had attached such that the Executive Order did not transfer that parcel to the Indian reservation.

Under the homestead laws, entry was effected by making a proper application with the land office, filing the appropriate affidavit of intent, paying certain required fees, and paying certain commissions. *See*, 17 Op. Atty. Gen. 161 (1881); *Hastings & Dakota R.R. v. Whitney, supra*. It is not disputed by the parties that Mouren complied with the above requirements prior to the issuance of the Executive Order. *See*, Exhibit 2, Appendix I. Plaintiff alleges that Mouren's failure to file an affidavit of good faith, the affidavits of two witnesses, make final proofs, file an affidavit of publication, file a declaration of intent to become a citizen, file a certificate re posting of notice, and receive a receipt for the payment of the final fees prevented his rights from attaching to the homestead parcel and that therefore the land passed to the reservation under the 1882 Executive Order. The Court, as noted above, has held that

entry is sufficient to remove the lands from disposition and that entry as to the homestead parcel occurred.

The Land Office homestead application (Exhibit 2, Appendix I) itself supports the finding that entry was made on the homestead parcel at the time the application was made, affidavit filed, and certain preliminary fees paid. The cases are settled that an entry recorded by the Land Office is sufficient to remove the land from other disposition from the public domain, *even* where the entry is invalid on its face. *Hastings & Dakota R.R. v. Whitney, supra,* at 363-364. The Court finds that, in this case, the entry on each parcel appears valid on its face. This alone would be sufficient for the Court to find that, at the time of the Executive Order, the parcels had been removed from the public domain such that the Order did not transfer the parcels to the Indian reservation.

In sum, the Court finds that, on June 27, 1882, the date of the Executive Order, both the preemption parcel and the homestead parcel had been removed from disposition such that the Order did not transfer those lands to the Indian reservation.

The second major issue is the effect, if any, of Mouren's fraud in obtaining the patents to the parcels. For the purposes of this motion defendants do not contest the allegation that such fraud was committed against the Land Office. Plaintiff argues that the fraud rendered the patents void because the Executive Order removed the land from the public domain and made it an Indian reservation prior to the issuance of the patent. Defendants agree that, where land has been previously removed from the public domain, a subsequent patent is void. However, defendants argue that where the land is patented from the public domain by fraud, the patent is voidable rather than void. The Court finds that defendants' position is correct. That is, that Mouren's fraud rendered the patents voidable rather than void. *Burke v. Southern Pacific R.R. Co.*, 234 U.S. 669 (1914).

As a subsidiary issue, defendants argue that should the patents be declared void, the lands would revert to the public domain rather than automatically becoming part of the Indian reservation. The Court finds that this position is correct; the statutory language of the Executive Order removes from the Indian reservation for all time any lands that were not included in 1882. Therefore, a subsequent voiding of the patents would restore the lands to the public domain to be disposed of as Congress sees fit. *Arnold v. Morton*, 529 F.2d 1101 (9th Cir. 1976). Accordingly, the Court finds that plaintiff cannot recover the lands in question through this suit and therefore has no standing to litigate what, in essence, is a possible claim by the United States against defendants to cancel the patents.

As the Court has held above, the entry on both parcels removed them from the public domain before the 1882 Executive Order, even where that entry was fraudulent. Under the language of the Order, the lands would revert to the public domain should the patents be cancelled. As well, the Court has held that a fraudulently obtained patent is, in those circumstances, voidable rather than void. Therefore, the Court finds that the effect of the fraud on the Land Office is to render the patents voidable by the United States but otherwise valid. Plaintiff can receive no benefit from any fraud perpetrated by Mouren on the Land Office.

Defendants submit that, in any event, they are bona fide purchasers of the land for value and without notice of any fraud [.] Plaintiff submits that the terms of the 1882 Executive Order constitute constructive notice and that in any event defendants should have been put on inquiry notice by those terms. Thus, plaintiff argues that defendants are not bona fide purchasers. In addition, plaintiff submits that the bona fide purchaser doctrine serves only to clear an otherwise valid legal title but cannot be used to validate a legally invalid title.

The Court finds that the terms of the Executive Order do not put defendants on constructive or inquiry notice of possible defects in their title. An examination of the Ex-

ecutive Order and an examination of the chain of title would reveal that the land was patented from the Land Office and, under the 1893 trust patent, excluded from the Indian reservation. Accordingly, the Court finds that defendants are bona fide purchasers of the parcels who took for value and without notice of any claims by plaintiff. Thus, any equitable clouds upon defendants' legal title would be cleared by application of the bona fide purchaser doctrine.

As a final area of conflict, defendants argue that whatever rights were accorded to plaintiff under the 1882 Executive Order were disestablished by subsequent events. Specifically, defendants argue that the 1893 trust patent, by granting land rights to the Indian tribe, extinguished any rights in the lands under the 1882 Executive Order. As well, defendants argue that the dismissal in 1901 of the 1894 suits in equity acted as a confirmation of the patents by the United States. Plaintiff argues that the 1893 trust patent did not disestablish the rights to the 1882 lands and submits that the 1864 Four Reservations Act imbued plaintiff with rights that cannot be extinguished without compensation under the Fifth Amendment.

The Court finds that the lands reserved under the 1882 Executive Order were subject to change at the discretion of the President and that the boundaries of that reservation could be changed without approval of the plaintiff. *Donnelly v. United States*, 228 U.S. 243 and 703 (1903); *Mattz v. Arnett*, 412 U.S. 481 (1973) at 493-494, n.15. Accordingly, the Court finds that the actions of the United States in issuing the 1893 trust patent without including the parcels in question was valid and completely extinguished any inchoate rights plaintiff had in those parcels. In any event, plaintiff's recourse for any taking that may have occurred must lie against the United States under the compensation clause of the Fifth Amendment and not against defendants. Accordingly, then, the Court finds that the 1893 trust patent disestablished any claims plaintiff had to the parcels involved in this action.

As to the equity suits, the Court finds that the doctrine of collateral estoppel might be applicable were the United States to bring suit to cancel the patents. In such an event, the dismissal in 1901 might act as a bar to recovery by the United States. In this litigation, however, the Court finds that the only significance of the 1894 suit and 1901 dismissal is to indicate that the United States recognized that patents had issued. Those suits can have no bearing on the rights of the litigants here *inter sese*.

The Court finds that defendants are the successors in interest to the original patentee of the homestead and preemption parcels; that those parcels were not included in the Indian reservation under the 1882 Executive Order; that the patents, although possibly voidable by the United States, are valid as against third parties; and that any rights plaintiff may have possessed in those parcels were extinguished by the 1893 trust patent. Accordingly, the Court finds that no genuine issue of material fact exists and that defendants are entitled to judgment as a matter of law.

Dated: August 22, 1980

Malcolm M. Lucas
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE PECHANGA BAND OF MISSION INDIANS
Plaintiff-Appellant,

v.

KACOR REALTY, INC., et at.,
Defendants-Appellees.

No. 80-5755
DC No. 78-4499-MML

OPINION

Appeal from the United States District Court
for the Central District of California
Malcolm M. Lucas, District Judge, Presiding
Argued and Submitted January 8, 1982

BEFORE: CHOY, KENNEDY and FARRIS, Circuit Judges.

CHOY, Circuit Judge:

The Pechanga Band of Mission Indians claims that its reservation includes 320 acres of undeveloped land in Riverside County, California, to which the defendants hold title. The district court entered summary judgment against the Band on three independent grounds. We need reach only the ground that the Government did not grant the land to the Band in order to affirm the district court's judgment.

I. History

Ownership of the land turns on events from the late 19th century. Peter Mouren, the defendants' precedessor-in-interest, obtained a patent to some of the land in 1882 and a second patent to the remainder in 1885. Due to suspected fraud by Mouren, the Government brought two lawsuits in 1894 to set aside the patents. It dropped the suits in mid-1901 prior to any decision on the merits.

The Pechanga Band derives whatever interest it may have in the land from the reservations established pursuant to two acts of Congress. In 1864, Congress empowered the President to set apart land in California "to be retained by the United States for the purposes of Indian reservations." The Four Reservations Act § 2, ch. 48, 13 Stat. 39, 40. Under the 1864 Act, the President could change the reservation sites almost at will. *See Mattz v. Arnett*, 412 U.S. 481, 494 n.15 (1973); *Donnelly v. United States*, 228 U.S. 243, 256-57 (1913). Through a series of Executive Orders over the two decades after the passage of the Act, a reservation for the Pechanga Band was established, disestablished, re-established and reshaped. *See* 1 C. Kappler, *Indian Affairs, Law, and Treaties* 819-24 (1904) (reproducing the orders).[1] One of the orders is especially important to this appeal. On June 27, 1882, President Arthur established a site for the Band's reservation which seems to have included the land presently at issue.[2]

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[1] In general, reservations created by Executive Order were temporary, *see* Sioux Tribe v. United States, 316 U.S. 317, 327-28 (1942); United States v. Southern Pacific Transportation Co., 543 F.2d 676, 687 (9th Cir. 1976); and their boundaries changed frequently, *see* Mattez v. Arnett, 412 U.S. 481, 493-94 n.15 (1973).

[2] A difficult issue that we need not resolve is whether the 1882 reservation actually included the land at issue. The Executive Order provided:

> That any tract or tracts the title to which has passed out of the United States, or to which valid, legal rights have attached under existing laws of the United States providing for the disposition of the public domain, are hereby excluded from the reservation hereby created.

Prior to the Order, Mouren had received a patent to some of the land and had taken all the steps needed to become entitled to a patent to the remainder. We reserve judgment on the whether the proviso would have excluded either parcel from the reservation.

Because the constantly-changing reservation sites under the 1864 Act proved unsatisfactory, Congress enacted the Mission Indians Relief Act, ch. 65, 26 Stat. 712 (1891). *See Arenas v. United States*, 322 U.S. 419, 421 (1944). The 1891 Act empowered the Secretary of the Interior to oversee the establishment of new, more secure reservations.[3] The

[3] The sections of the 1891 Act governing the creation of reservations stated:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That immediately after the passage of this act the Secretary of the Interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided.
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> Sec. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior. They shall also appraise the value of the improvements belonging to any person to whom valid existing rights have attached under the public-land laws of the United States, or to the assignee of such person, where such improvements are situated within the limits of any reservation selected and defined by said commissioners subject in each case to the approval of the Secretary of the Interior. In cases where the Indians are in occupation of lands within the limits of confirmed private grants, the commissioners shall determine and define the boundaries of such lands, and shall ascertain whether there are vacant public lands in the vicinity to which they may be removed. And the said commission is hereby authorized to employ a competent surveyor and the necessary assistant.
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> Sec. 3. That the commissioners, upon the completion of their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said

first step in the process was for him to appoint commissioners to propose reservation sites. Their selection became "valid when approved by the President and the Secretary of the Interior." The Act instructed the Secretary that "if no valid objection exists, [he] shall cause a patent to issue for each of the reservations selected by the commission." An explicit constraint on this consummating act was that "no patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain."

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period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever: *Provided*, That no patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain, unless such person shall acquiesce in and accept the appraisal provided for in the preceding section in all respects and shall thereafter, upon demand and payment of said appraised value, execute a release of all title and claim thereto; and a separate patent, in similar form, may be issued for any such tract or tracts, at any time thereafter. Any such person shall be permitted to exercise the same right to take land under the public-land laws of the United States as though he had not made settlement on the lands embraced in said reservation; and a separate patent, in similar form, may be issued for any tract or tracts at any time after the appraised value of the improvements thereon shall have been paid: *And provided further*, That in case any land shall be selected under this act to which any railroad company is or shall hereafter be entitled to receive a patent, such railroad company shall, upon releasing all claim and title thereto, and on the approval of the President and Secretary of the Interior, be allowed to select an equal quantity of other land of like value in lieu thereof, at such place as the Secretary of the Interior shall determine: *And provided further*, That said patents declaring such lands to be held in trust as aforesaid shall be retained and kept in the Interior Department, and certified copies of the same shall be forwarded to and kept at the agency by the agent having charge of the Indians for whom such lands are to be held in trust, and said copies shall be open to inspection at such agency.

The Pechanga Band's present reservation was established pursuant to the 1891 Act. The commissioners' proposal included the land at issue, and President Harrison directed that the proposed site be set aside until a patent could be issued. The Secretary of the Interior, however, decided to issue a patent only to the uncontested parcels and await a judicial determination on whether Mouren had a valid right to the land at issue. Because the Government dropped its suits against Mouren prior to any decision on the merits, the Secretary never issued a patent to the Band for the land at issue. The Secretary thus did not take the final step required under the Act to include the land in the reservation.

II. The Pechanga Band's Arguments

The Pechanga Band makes two arguments why we should find that it has a legal interest in the land despite the Secretary's decision not to include it in the patent establishing the Band's reservation: (1) the Secretary lacked authority to remove land from the reservation established by the 1882 Executive Order, and (2) the actions taken by him pursuant to the 1891 Act effectively conveyed the land at issue to the Band. We find neither argument persuasive.

A. The Secretary's Authority

The Mission Indians Relief Act of 1891 worked to extinguish whatever interest the Band had in the land pursuant to the 1882 Executive Order. A primary purpose of the 1891 Act was to replace the old, constantly-changing reservations with new, more secure ones. Although the new reservations were to "include, as far as practicable, the lands and villages which have been in actual occupation and possession of said Indians," inclusion of the prior sites was not mandated.

The Pechanga Band asserts, however, that the 1882 Order was a presidential act that could not be reversed by the Secretary of the Interior. In support of this assertion, it cites *Sekaquaptewa v. MacDonald*, 626 F.2d 113, 118 (9th

Cir. 1980), *United States v. Southern Pacific Transportation Co.*, 601 F.2d 1059, 1064 (9th Cir. 1979), and *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 689 (9th Cir. 1976). Because the officials in those cases were not empowered to convey the land there at issue, we held that their actions had no effect. But in this case, Congress authorized the Secretary to decide what land to include in the Pechanga Band's new reservation. The Band does not contend that Congress lacked power to extinguish whatever rights were created by the 1882 Order, or that Congress could not convey that power to the Secretary.

B. The Secretary's Actions

Despite the Secretary's decision not to include the land in the patent, the Pechanga Band urges us to consider the Secretary's apparent desire to enlarge the reservation. The Band has not, however, supplied us any reason to look past the Secretary's unambiguous actions. Both opinions cited by the Band discussed intent only because the actions taken by the official did not purport to modify the reservation site. *Sekaquaptewa v. MacDonald*, 626 F.2d at 118; *United States v. Southern Pacific Transportation Co.*, 543 F.2d at 690. In this case, the Secretary had to issue a patent to the land in order to include it in the reservation. The record is unambiguous that he purposefully elected not to take this final step. We therefore cannot speculate whether the Secretary would have preferred in the abstract to grant the land to the Pechanga Band.

III. Conclusion

Indians have a special relationship with the federal government and are entitled to special protection. *See Red Fox v. Red Fox*, 564 F.2d 361, 365 (9th Cir. 1977). However, we cannot avoid the conclusions that the patent establishing the Pechanga Band's reservation did not include the land at issue, and that we cannot independently grant the land to the Band.

AFFIRMED.

APPENDIX C

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOTE:

Apparently the Court of Appeals has not prepared a separate document as its judgment in this case. However, it did send to petitioner's counsel of record, along with a copy of its opinion which was filed on June 22, 1982, a document entitled "Notice of Entry of Judgment" which states that "Judgment was entered in this case as of the file stamp date on the attached decision of the court."

If the petition is granted, or if the Court should so desire, counsel for petitioner will obtain such a separate document embodying the judgment of the Court of Appeals, if such a separate document exists or can be prepared.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE PECHANGA BAND OF MISSION INDIANS,

Plaintiff-Appellant,

v.

KACOR REALTY, INC., etc., et al.,

Defendants-Appellees

No. 80-5755

ORDER

Before: CHOY, KENNEDY and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

Dated: July 3, 1982